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No. 84-673

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In The
Supreme Court of the United States
October Term, 1984

STANLEY J. PERWIN,
Petitioner,
vs.

ROBERT N. WILENTZ, Chief Justice,
Supreme Court of New Jersey, *et al.*,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI ON BEHALF OF
RESPONDENTS WILENTZ, ET AL.**

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QUESTIONS PRESENTED

1. Does a United States District Court have jurisdiction over an action that challenges the final determination of a state court in an attorney disciplinary proceeding and raises issues that are "inextricably intertwined" with the state court determination?

2. Does the doctrine of collateral estoppel prevent a plaintiff from raising federal constitutional claims in a United States District Court if those same claims were previously raised and rejected in a state court?

3. Do the disciplinary rules and practices governing attorney conduct established by the Supreme Court of New Jersey violate due process and equal protection because they provide for the imposition of discipline on a case by case basis and do not authorize readmission after disbarment?

TABLE OF CONTENTS

	Pages
Opinions Below	1
Statement of the Case	2
Reasons for Denying the Writ:	
A. The Courts Below Correctly Determined That Jurisdiction Was Lacking Because Plaintiff's Action Essentially Sought Review By The Lower Federal Courts Of The Final Determination Of A State Court In A Bar Disciplinary Proceeding.	4
B. Since Plaintiff Freely Chose To Litigate His Federal Constitutional Claims Before The Supreme Court Of New Jersey, The Courts Below Properly Prevented Him From Collaterally Attacking The State Court's Rejection Of His Claims In A Federal Civil Rights Action.	7
C. The Courts Below Properly Held That The Attorney Disciplinary Practices Of The Supreme Court Of New Jersey Which Treat Disbarment As Permanent And Impose Disciplinary Sanctions On A Case By Case Basis Are Rationally Related To The Goals Of Protecting The Public And Enhancing Confidence In The Bar And Hence Satisfy The Requirements Of Equal Protection And Substantive Due Process.	10
Conclusion	17
Appendix	App. 1

TABLE OF AUTHORITIES

CASES:

<i>Allen v. McCurry</i> , 449 U.S. 90 (1980)	7, 9, 10
<i>Aronson v. Ambrose</i> , 479 F.2d 75 (3d Cir. 1973), cert. denied 414 U.S. 854 (1973)	11

TABLE OF AUTHORITIES—Continued

	Pages
<i>Atlantic Coast Line R. Co. v. Engineers</i> , 398 U.S. 281 (1970)	5
<i>Chaney v. State Bar of California</i> , 386 F.2d 962 (9th Cir. 1976), cert. denied 390 U.S. 1011 (1968)	12
<i>City of New Orleans v. Dukes</i> , 427 U.S. 297 (1976)	12, 16
<i>Cleveland Board of Education v. LaFleur</i> , 414 U.S. 632 (1974)	13, 14, 15
<i>Coogan v. Cincinnati Bar Association</i> , 431 F.2d 1201 (9th Cir. 1970)	8
<i>District of Columbia Court of Appeals v. Feldman</i> , 460 U.S. 462 (1983)	passim
<i>Doe v. Pringle</i> , 550 F.2d 596 (10th Cir. 1976), cert. denied 431 U.S. 916 (1977)	6
<i>Erdman v. Stevens</i> , 548 F.2d 1205 (2nd Cir. 1972), cert. denied 409 U.S. 889 (1972)	5, 11
<i>Goldfarb v. Virginia State Bar</i> , 421 U.S. 773 (1975)	11
<i>Goodrich v. Supreme Court of State of South Da- kota</i> , 511 F.2d 316 (8th Cir. 1975)	8
<i>In Re Eastern Sugar Antitrust Litigation</i> , 697 F. 2d 524 (3d Cir. 1982)	12
<i>In Re Greenberg</i> , 21 N.J. 213, 121 A.2d 520 (1956)	13, 14
<i>In Re Isserman</i> , 35 N.J. 198, 172 A.2d 425 (1976)	13
<i>In Re Mink</i> , 60 N.J. 609 (1973)	14
<i>In Re Wilson</i> , 81 N.J. 451, 409 A.2d 1153 (1979)	14
<i>Kremer v. Chemical Construction Corp.</i> , 456 U.S. 461 (1982)	8
<i>Leis v. Flynt</i> , 439 U.S. 438 (1979)	11
<i>Matter of Randall</i> , 640 F.2d 898 (8th Cir. 1981), cert. denied 454 U.S. 880 (1981)	5, 8, 13

TABLE OF AUTHORITIES—Continued

	Pages
<i>Middlesex County Ethics Committee v. Garden State Bar Assn.</i> , 457 U.S. 423 (1982)	9, 10, 11, 12, 13
<i>Mildner v. Gulotta</i> , 405 F. Supp. 182 (E.D.N.Y. 1975), aff'd 425 U.S. 901 (1976)	12
<i>Montana v. United States</i> , 440 U.S. 147 (1979)	7, 8
<i>Ohralik v. Ohio State Bar Assn.</i> , 436 U.S. 447 (1978)	11
<i>Parklane Hosiery Co., Inc. v. Shore</i> , 439 U.S. 322 (1979)	7
<i>Potter v. New Jersey Supreme Court</i> , 403 F. Supp. 1036 (D. N.J. 1975), summ. aff'd 546 F.2d 418 (3d Cir. 1976)	14, 15
<i>Rooker v. Fidelity Trust Co.</i> , 263 U.S. 413 (1923)	5
<i>Silverton v. Department of Treasury</i> , 644 F.2d 1341 (9th Cir. 1981), cert. denied 454 U.S. 895 (1981)	5
<i>Stanley v. Illinois</i> , 405 U.S. 645 (1972)	13, 14, 15
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	15
<i>Whitfield v. Illinois Board of Law Examiners</i> , 504 F.2d 474 (7th Cir. 1974)	12
<i>Younger v. Colorado State Bd. of Law Examiners</i> , 625 F.2d 372 (10th Cir. 1980)	14

STATUTES:

28 U.S.C. §1738	8
42 U.S.C. §1983	3, 7, 8

CONSTITUTION:

<i>N.J. Const.</i> (1947), Article VI, Section II	15
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ROBERT N. WILENTZ, Chief Justice,
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Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR A
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RESPONDENTS WILENTZ, ET AL.**

The Respondents, Robert N. Wilentz, Chief Justice of the Supreme Court of New Jersey, *et al.*, respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on July 24, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit in this matter is contained in Appendix

A of Petitioner's Appendix and is as yet unreported. The opinion of the United States District Court for the District of New Jersey in this case was entered on November 21, 1983 and is contained in the Appendix to this brief. The opinion of the District Court is also unreported.

STATEMENT OF THE CASE

The petitioner in this case, Stanley J. Perwin, was disbarred by the Supreme Court of New Jersey in 1972 following a criminal conviction for defrauding an insurance company. When Perwin succeeded in having the conviction voided on double jeopardy grounds in the context of a *habeas corpus* proceeding, he applied for reinstatement to the New Jersey bar. Following a hearing conducted by the Essex County Ethics Committee, the Supreme Court of New Jersey in October 1976 accepted the Committee's recommendation that the application for reinstatement be denied. Perwin submitted a second application for reinstatement to the bar in 1981. The petition and brief filed in support of this application argued that Perwin had been rehabilitated and that New Jersey's policy of permanent disbarment was constitutionally infirm under the equal protection and due process clauses. The Supreme Court of New Jersey denied Perwin's second application for readmission in April 1982, thereby also rejecting his federal constitutional claims.

Although dissatisfied with this result, Perwin did not seek review in the Supreme Court of the United States. Rather, he filed a Complaint against the Supreme Court of

New Jersey in the United States District Court for the District of New Jersey under 42 U.S.C. §1983. In his Complaint, Perwin alleged that the New Jersey disciplinary rules governing disbarment, both facially and as applied to him, violated equal protection and due process because they provided for the imposition of sanctions on a case by case basis and failed to establish a mechanism for re-admission following disbarment. In response to the Complaint, defendants moved for summary judgment and obtained a favorable ruling from the district court.

The district court rendered three alternative holdings in support of its determination rejecting Perwin's claims. It first concluded that to the extent the Complaint challenged the denial of Perwin's application for reinstatement to the bar by the Supreme Court of New Jersey, or raised issues "inextricably intertwined" with that denial, federal jurisdiction was lacking under *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The district court also found that the doctrine of collateral estoppel barred review of Perwin's federal constitutional claims because he had previously raised the same claims before the Supreme Court of New Jersey in the context of his reinstatement proceeding. Finally, the district court held that even if it could have entertained Perwin's constitutional claims, it would have found them totally lacking in merit. In this regard, the court held that the imposition of attorney discipline on a case by case basis was rationally related to a legitimate state interest and hence complied with the dictates of equal protection and substantive due process. The court also rejected Perwin's irrebuttable presumption claim because the Supreme Court of New Jersey had, in fact, granted reinstatement to several dis-

barred attorneys despite its general policy of permanent disbarment. The Third Circuit affirmed the ruling of the district court on each of these three alternate grounds.

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REASONS FOR DENYING THE WRIT

The writ sought here should be denied because the courts below correctly interpreted and applied the precedents of this Court to the particular facts of this case. Moreover, the judgment issued in favor of the defendants rested on three separate grounds, each of which supports the result reached below. To grant the writ as to any one issue would be futile, therefore, since the judgment would be upheld in any event on an alternate ground. Finally, *certiorari* review is not warranted here on the constitutional issues because they are frivolous, and is not warranted as to the jurisdictional rulings below because they were narrowly drawn, turned on the specific factual context involved, and rested squarely upon the prior decisions of this Court.

A. The Courts Below Correctly Determined That Jurisdiction Was Lacking Because Plaintiff's Action Essentially Sought Review By The Lower Federal Courts Of The Final Determination Of A State Court In A Bar Disciplinary Proceeding.

This Court recently held that federal district courts lack subject matter jurisdiction to review orders of state courts denying particular applications for bar admission. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). By analogy, this holding applies as well to attorney disciplinary actions taken by state courts. See,

e.g. Silverton v. Department of Treasury, 644 F.2d 1341 (9th Cir. 1981), *cert. denied* 454 U.S. 895 (1981); *Matter of Randall*, 640 F.2d 898 (8th Cir. 1981), *cert. denied* 454 U.S. 880 (1981). Where state courts render final determinations in judicial proceedings such as disbarment or reinstatement actions, review of those determinations can be sought *only* in the Supreme Court of the United States; the district courts, having only original jurisdiction, cannot sit as appellate courts in regard to such judicial decisions rendered by state courts. *Feldman, supra*, 460 U.S. at 476; *Atlantic Coast Line R. Co. v. Engineers*, 398 U.S. 281, 296 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923). If Perwin desired further review of the disciplinary actions taken against him by the Supreme Court of New Jersey, including the recent rejection of his second motion for reinstatement, he should have followed "the traditional method of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings" mentioned in *Erdman v. Stevens*, 548 F.2d 1205, 1211 (2nd Cir. 1972), *cert. denied* 409 U.S. 889 (1972)—that is, by taking an appeal or filing a petition for a writ of *certiorari* with the Supreme Court of the United States. To the extent that Perwin's federal action can be construed as a challenge to the final determinations of the Supreme Court of New Jersey imposing disbarment upon him and rejecting his motions for reinstatement, then this action is barred for lack of subject matter jurisdiction in federal district court.

Although Perwin attempts to characterize his federal action solely as a challenge to the New Jersey disciplinary procedures regarding disbarment, it is evident that he also tried to have the district court review the disciplinary

actions taken against him by the Supreme Court of New Jersey. The district court held as much when it concluded that Perwin's federal lawsuit included the allegation that the State court acted improperly in denying his application for reinstatement. Regardless of the form or label given by Perwin to his federal action, however, it in fact constituted a challenge to a particular disciplinary determination rendered by the Supreme Court of New Jersey and, as such, must be dismissed as an impermissible collateral attack upon that determination.

While *Feldman* does allow a federal district court to entertain a constitutional challenge to a disciplinary rule of general applicability, 460 U.S. at 483-486, this jurisdiction extends only to claims that challenge the validity of rules promulgated by a state court in a non-judicial proceeding where no final state court adjudication is involved. *Ibid.* See also *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), cert. denied 431 U.S. 916 (1977). Here, however, Perwin freely raised his constitutional challenge to the disciplinary rules before the Supreme Court of New Jersey in the context of his reinstatement proceeding. When that court rejected his application for readmission, therefore, it also rejected his federal constitutional attack upon the disciplinary rules. By intertwining his rules challenge with his reinstatement effort in state court, Perwin foreclosed any opportunity he may otherwise have had to seek review of the New Jersey disciplinary rules in the lower federal courts. For, once the Supreme Court of New Jersey rejected his rules challenge in a judicial proceeding such as a reinstatement action, Perwin's only option was to seek further review of the denial of his constitutional claims in this Court; review of his rules challenge in the district court

was simply not available to him. *Feldman, supra*, 460 U.S. at 476.

Since the lower federal courts properly interpreted and applied *Feldman* to the facts of this case, Perwin's petition for a writ of *certiorari* on this issue should be denied.

B. Since Plaintiff Freely Chose To Litigate His Federal Constitutional Claims Before The Supreme Court Of New Jersey, The Courts Below Properly Prevented Him From Collaterally Attacking The State Court's Rejection Of His Claims In A Federal Civil Rights Action.

The doctrine of collateral estoppel, also known as "issue preclusion," prevents a party in a second lawsuit from raising issues that were litigated in and were necessary to the outcome of the first action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). The purpose of the doctrine is to prevent parties from relitigating issues that they already had a full and fair opportunity to contest in an earlier case. Such preclusion is favored because it conserves judicial resources, prevents the vexation of multiple lawsuits, and supports the finality of judicial decisions. *Montana v. United States*, 440 U.S. 147, 153-154 (1979).

It is well-established that the principles of collateral estoppel apply when plaintiffs in federal actions brought under 42 U.S.C. §1983 attempt to relitigate issues previously decided against them in state court. *Allen v. McCurry, supra*, 449 U.S. at 102. In *Allen*, the Court refused to hear a §1983 damage action which alleged as its basis an unconstitutional search and seizure because the same issue

had been raised by and decided against the federal plaintiff in a prior state court criminal proceeding. Where a party freely and without reservation submits federal claims for decision to the state courts and has them decided there, considerations of comity and repose militate against redetermination of those claims in a federal forum. — *Montana v. United States*, *supra*, 440 U.S. at 163. Moreover, federal deference to state court decisions is required by 28 U.S.C. §1738 which directs federal courts to give full faith and credit to state court judgments. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982).

Federal courts have frequently applied collateral estoppel in attorney discipline cases. For example, in *Goodrich v. Supreme Court of State of South Dakota*, 511 F.2d 316 (8th Cir. 1975), the Court dismissed a §1983 action brought by an attorney who alleged that the state disciplinary proceedings taken against him had not complied with due process. Since the Supreme Court of South Dakota had previously considered and decided these federal constitutional issues, the *Goodrich* Court held that relitigation was barred by the doctrine of collateral estoppel. A similar result was reached in *Coogan v. Cincinnati Bar Association*, 431 F.2d 1201 (9th Cir. 1970), where the court dismissed a civil rights action brought by an attorney to enjoin the enforcement of his suspension from the practice of law by the Supreme Court of Ohio. *See also Matter of Randall*, 640 F.2d 898 (8th Cir. 1981), *cert. denied* 454 U.S. 880 (1981) (collateral estoppel applied to prevent the raising of issues previously litigated in the context of state attorney disciplinary proceedings).

In this case, Perwin freely submitted the due process and equal protection claims contained in his federal civil

rights action to the Supreme Court of New Jersey when he applied to that Court for reinstatement to the bar in 1982. While Perwin could have based his petition and supporting brief solely on the allegation that he was entitled to reinstatement because of rehabilitation, he chose not to do so. Rather, he broadened the basis of his application and charged as well that the New Jersey disciplinary rules and practices governing disbarment and readmission violated the due process and equal protection clauses of the Constitution of the United States. In fact, Perwin's brief in support of his petition for reinstatement contained a lengthy discussion of the disciplinary rules and practices in question. Perwin's assertions were opposed by the Division of Ethics and Professional Services which submitted a brief disputing both Perwin's right to reinstatement and his federal constitutional claims. The Supreme Court of New Jersey thus considered all of these issues before denying the petition for reinstatement. Since this decision effectively rejected Perwin's federal constitutional challenge to the attorney disciplinary rules, the courts below properly found that he was barred under the doctrine of collateral estoppel from raising the same claims in this subsequently filed action. *See Allen v. McCurry, supra*, 449 U.S. at 95-103.

In his petition Perwin attempts to circumvent the application of collateral estoppel by characterizing the rejection of his application for reinstatement by the Supreme Court of New Jersey as the "administrative decision" of "a licensing board." This Court recognized in *District of Columbia Court of Appeals v. Feldman, supra*, 460 U.S. at 482, however, that state bar disciplinary proceedings are judicial in nature. *See also Middlesex County*

Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982). When the Supreme Court of New Jersey rejected Perwin's application for reinstatement, it determined as a legal matter that Perwin was not entitled to readmission to the bar and that his constitutional challenge to the disciplinary rules was without merit. Such an action is, at its essence, judicial in nature, and is neither legislative, nor ministerial, nor administrative. *Feldman, supra*, 460 U.S. at 479-482. As a final judgment of a state court in a judicial proceeding, therefore, the determination of the Supreme Court of New Jersey was entitled to collateral estoppel effect in federal court. *Allen v. McCurry, supra*, 449 U.S. at 95-103. Since the courts below properly applied the doctrine of collateral estoppel as developed in the precedents of this Court to the particular facts of this case in barring Perwin's federal action, the petition for a writ of *certiorari* should be denied.

C. The Courts Below Properly Held That The Attorney Disciplinary Practices Of The Supreme Court Of New Jersey Which Treat Disbarment As Permanent And Impose Disciplinary Sanctions On A Case By Case Basis Are Rationally Related To The Goals Of Protecting The Public And Enhancing Confidence In The Bar And Hence Satisfy The Requirements Of Equal Protection And Substantive Due Process.

In support of his petition, Perwin argues that New Jersey's practice of imposing permanent disbarment for egregious ethical violations is constitutionally infirm under substantive due process because it allegedly creates an impermissible irrebuttable presumption as to the lack of fitness of a disbarred attorney to practice law. Under the guise of equal protection, Perwin also claims that the

imposition of attorney discipline on a case by case basis—a process that enables the Supreme Court to tailor sanctions to the circumstances involved in any particular ethical violation—is inconsistent with equal protection because it allegedly leads to the discriminatory treatment of disciplined attorneys. Defendants contend that the mere statement of these claims highlights their lack of merit—a contention endorsed by both courts below when they summarily rejected all of Perwin's constitutional claims. Before analyzing these claims, however, it is important to discuss the context in which they have arisen as well as the deference which should be afforded to the disciplinary rules and practices established by the Supreme Court of New Jersey.

Since the practice of law is primarily a state concern, state courts have traditionally been accorded wide discretion in establishing standards of professional conduct and disciplinary mechanisms to enforce those standards. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, *supra*, 457 U.S. at 434; *Aronson v. Ambrose*, 479 F.2d 75, 77 (3d Cir. 1973), *cert. denied* 414 U.S. 854 (1973); *Erdman v. Stevens*, *supra*, 458 F.2d at 1210. In fact, this Court has noted that “the States have a compelling interest in the practice of professions within their boundaries . . . [with] broad power to establish standards for licensing practitioners and regulating the practice of professions.” *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). The states' interest in regulating lawyers is “‘especially great since lawyers are essential to the primary governmental function of administering justice. . . .’” *Ohrlik v. Ohio State Bar Assn.*, 436 U.S. 447, 460 (1978), quoting *Goldfarb*, *supra*, 421 U.S. at 792. See also *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

In recognition of the substantial state interest in and control over the local bar, federal courts typically give deference to state rules, procedures, and determinations in the areas of bar admission and attorney discipline. *Mildner v. Gulotta*, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd* 425 U.S. 901 (1976). *See also Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974). Each state is free, for example, to impose high standards for bar admission and discipline, even if the standards chosen are different from—and more stringent than—the standards endorsed by other states. *See Chaney v. State Bar of California*, 386 F.2d 962, 965 (9th Cir. 1976), *cert. denied* 390 U.S. 1011 (1968). Close supervision by the states over attorney discipline is especially justified because of the public interest involved. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, *supra*, 457 U.S. at 433-435. It is with the foregoing principles as a backdrop that Perwin's constitutional claims must be analyzed.

The disciplinary rules and practices of the Supreme Court of New Jersey are valid under the rational basis test because they are supported by legitimate state interests. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Analysis of the rules must be conducted under the rational basis test because neither a suspect classification nor fundamental right has been alleged in this case. *Ibid.* It is obvious that there is a rational basis for the imposition of attorney discipline on a case by case basis. As the Third Circuit recently observed in *In Re Eastern Sugar Antitrust Litigation*, 697 F.2d 524, 530 (3d Cir. 1982), "Analysis of ethical duties . . . proceeds on a case by case basis, involving the careful sifting and weighing of all relevant facts and circumstances." *See also In*

re Greenberg, 21 N.J. 213, 121 A.2d 520, 527 (1956), where the court concluded in regard to disciplinary actions that, "In the ultimate, each case must rest largely upon its own particular circumstances." A similar conclusion was reached in *Matter of Randall*, *supra*, 640 F.2d at 903 to 904. The very nature of attorney disciplinary proceedings thus demands a case by case approach, with sanctions being tailored to the particular facts and circumstances presented. Not only does such an approach make sense, but it furthers the important state interest in protecting the public through the close supervision of the bar. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, *supra*, 457 U.S. at 434. It consequently is consistent with the dictates of equal protection, as the courts below found.

Perwin also alleges that the general practice followed in New Jersey of precluding readmission after disbarment violates the due process clause in that it creates an impermissible irrebuttable presumption that the disbarred attorney is unfit to practice law. In support of this position, Perwin cites *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), and *Stanley v. Illinois*, 405 U.S. 645 (1972). The irrebuttable presumption doctrine used in those two cases is not applicable here, however, for several reasons.

First, no irrebuttable presumption exists. In several instances, the Supreme Court of New Jersey has granted reinstatement to disbarred attorneys. Where individual situations justify readmission, therefore, it is not absolutely precluded. Even if some sort of presumption were found to exist in the New Jersey practice, then, it certainly is not "irrebuttable." See, e.g. *In re Isserman*, 35

N.J. 198, 172 A.2d 425 (1976); *In re Mink*, 60 N.J. 609 (1973) (New Jersey attorneys admitted to practice following disbarment).

Moreover, the New Jersey Supreme Court's policy toward disbarred attorneys does not "presume" anything, but rather reflects the conscious choice of one substantive policy over another. To protect the users of legal services and to instill in the public confidence in the bar, the Supreme Court of New Jersey has decided that those attorneys who engage in the most serious misconduct should generally be prohibited from resuming the practice of law. *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979); *In re Greenberg, supra*, 21 N.J. at 224-225, 121 A.2d at 527. Since the primary aim of imposing disbarment on a permanent basis is to protect the public, the policy does not rest on the continuing lack of fitness of the particular attorney, as Perwin alleges, but rather on the determination of the court that public confidence in the bar would be eroded if attorneys who engage in serious and abhorrent misconduct in violation of their public trust are readmitted to practice. This judgment is reflected in the substantive standard of the Supreme Court of New Jersey generally precluding reinstatement following disbarment. No presumptions—irrebuttable or otherwise—are involved here, therefore, rendering inapplicable the holdings in *LaFleur* and *Stanley* upon which the plaintiff relies. See *Younger v. Colorado State Bd. of Law Examiners*, 625 F.2d 372, 378 (10th Cir. 1980) (irrebuttable presumption doctrine found not to apply to bar admission rule which prevented individuals who had failed the Colorado bar exam three times from sitting for the exam again); *Potter v. New Jersey Supreme Court*, 403 F. Supp.

1036, 1038-1039 (D. N.J. 1975), *summ. aff'd*, 546 F.2d 418 (3d Cir. 1976) (irrebuttable presumption doctrine found not to apply to bar rule preventing the admission of individuals who attended nonaccredited law schools). In fact, were the irrebuttable presumption doctrine to be applied here as Perwin urges, it would effectively strip the Supreme Court of New Jersey of its constitutional authority to regulate the practice of law. *See Id.* at 403 F. Supp. at 1039; *see also N.J. Const.* (1947), Article VI, Section II, Par. 3.

Plaintiff's attempt to use the irrebuttable presumption doctrine in this case should also be rejected because the doctrine has been severely limited by this Court to situations quite dissimilar from the one presented here. The demise of the doctrine was advocated in a strong concurring opinion by Justice Powell in *Cleveland Board of Education v. LaFleur*, *supra*, 414 U.S. at 651, where he maintained that "irrebuttable presumptions" were really nothing more than legislative classifications which should be reviewed under equal protection analysis—that is, most commonly, under the rational basis standard. This view quickly found favor with a majority of the Court in *Weinberger v. Salfi*, 422 U.S. 749, 767-770 (1975). There the Court used the rational basis test to review duration of relationship requirements which widows needed to satisfy before qualifying for Social Security benefits. The Court distinguished *LaFleur* and *Stanley* as meriting greater scrutiny because those cases involved fundamental rights associated with the family and protected by the Constitution. *Weinberger v. Salfi*, *supra*, 422 U.S. at 771-772. Since the right to practice law is not a fundamental right protected by the Constitution, *LaFleur* and *Stanley* do not apply here and the rational basis test governs instead.

It is beyond question that the objectives of the New Jersey disciplinary practice challenged here—the protection of the public and the preservation of the public trust in the bar—are legitimate state objectives. Moreover, it is also beyond question that a policy of permanent disbarment with limited exceptions does protect the public from further harm by proven violators of the public trust, and enhances confidence in the bar by assuring the public that the most egregious violators of the canons of professional conduct will not be permitted to resume the practice of law. Consequently, the rule in issue here is rationally related to important state objectives, as the courts below found.

In applying the rational basis test, courts do not debate the wisdom of a particular policy, but rather leave such judgments to the legislative body charged with making the classification—that is, as long as its choice is reasonably related to a legitimate state objective. Whether another policy could achieve similar ends is immaterial, therefore, as long as the chosen policy meets the rational basis test. See *City of New Orleans v. Dukes*, *supra*, 427 U.S. at 303. Consequently, it is irrelevant if Perwin thinks that another rule would be better, or if other jurisdictions prefer different and less stringent rules more to his liking. Because the courts below correctly held that the challenged rules and practices met the rational basis test, this court should deny the petition for a writ of *certiorari*.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* in this case should be denied.

Respectfully submitted,

IRWIN I. KIMMELMAN
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November 26, 1984

APPENDIX

Opinion of the United States District Court
for the District of New Jersey

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 82-4444M

(Judge Muir-by designation)

Complaint Filed 12/30/82

STANLEY J. PERWIN,

Plaintiff

vs.

ROBERT N. WILENTZ, Chief Justice,
Supreme Court of New Jersey, et al.,

Defendants

OPINION

(Filed November 21, 1983)

MUIR, District Judge.

Plaintiff Stanley J. Perwin practiced law in the State of New Jersey until the Supreme Court of New Jersey disbarred him in 1972. Perwin has twice unsuccessfully attempted to gain reinstatement to the New Jersey bar. In this civil suit, instituted under 42 U.S.C. §1983 Perwin claims that the disciplinary rules promulgated by the Supreme Court of New Jersey pursuant to which he was disbarred violate Perwin's right to due process and to equal protection of the laws.

The Defendants in this action are the Justices of the Supreme Court of New Jersey (hereinafter the Supreme Court Defendants) and Allyn Z. Lite, Clerk of the United

App. 2

States District Court for the District of New Jersey. The Defendants have filed motions for summary judgment which are now ripe for this Court's decision.

Background

In 1971, a New Jersey jury convicted Perwin of charges of conspiracy and obtaining money under false pretenses. *State vs. Yormark*, 117 N.J. Super. 313, 284 A.2d 549 (App. Div. 1971), *certif. den.*, 60 N.J. 138, 286 A.2d 511 (1972), *cert. den.*, 409 U.S. 862 (1972). Perwin's conviction arose out of a scheme whereby various lawyers, doctors, and an insurance company employee presented false claims to an insurance company. Following Perwin's conviction, the Supreme Court of New Jersey entered an order disbarring Perwin from the practice of law in the State of New Jersey. *In Re Perwin*, 60 N.J. 171, 287 A.2d 3 (1972). The Supreme Court's disbarment order stated that in light of Perwin's expressed intent to seek further review of his conviction "[s]hould he prevail in those efforts, he may apply to us for reconsideration of this Order." Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (hereinafter "memo in opposition"), exhibit A.

Following his disbarment, Perwin successfully petitioned the United States District Court for the District of New Jersey for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The habeas corpus order declared Perwin's conspiracy conviction defective on double jeopardy grounds. The order declared Perwin's conviction on the related charges defective for other reasons and indicated that retrial on those charges would be appropriate. The state elected not to retry Perwin.

App. 3

In 1974, Perwin petitioned the Supreme Court of New Jersey for reconsideration of its disbarment order and reinstatement of Perwin to the New Jersey bar. *See* Affidavit of Stephen W. Townsend (hereinafter "Townsend affidavit"), exhibit A. The New Jersey Supreme Court remanded the matter to the Essex County Ethics Committee "for a hearing on the record made at the criminal trial and preparation of its findings thereon. . . ." *Id.*, exhibit B. The Ethics Committee held a hearing at which Perwin testified and thereafter recommended that Perwin's petition for reinstatement be denied. *Id.*, exhibit F. On October 20, 1976, the New Jersey Supreme Court denied, without opinion, Perwin's petition for reinstatement. *Id.*, exhibit G.

In 1981, Perwin again petitioned the New Jersey Supreme Court for reinstatement to the New Jersey bar. *Id.*, exhibit H. In filing this petition, as well as his first petition, Perwin was represented by counsel. In the brief in support of his petition, *Id.*, exhibit I, Perwin argued that under New Jersey law Perwin was eligible for reinstatement. In addition, pages 20 through 22 of the brief argued that the disciplinary rules promulgated by the New Jersey Supreme Court contravened the due process and equal protection clauses of the fourteenth amendment of the United States Constitution. Specifically, Perwin stated that "the failure of the Court, under its Constitutional procedures, to establish reasonable standards and guidelines by which a disbarred attorney can seek reinstatement and, by its action in reinstating only a select few who have applied, denies him the right to practice law without due process and in so doing denies him equal protection of the law." The Division of Ethics and Professional Services of the Administrative Office of the Courts of the State

App. 4

of New Jersey submitted a brief in opposition to Perwin's petition for reinstatement. The Division's brief devoted four pages to a discussion of Perwin's constitutional claims. *Id.*, Exhibit J. On April 27, 1982, the Supreme Court of New Jersey issued an order denying, without opinion, Perwin's motion for reinstatement. *Id.*, exhibit L. Perwin did not appeal the supreme court's order to the United States Supreme Court. Rather, in December of 1982, Perwin filed his civil rights action in federal court. Perwin seeks declaratory and injunctive relief including an order requiring the Supreme Court of New Jersey to grant him a hearing regarding readmission to the New Jersey Bar and "a writ of mandamus requiring the Supreme Court of New Jersey to show cause why the Plaintiff should not be admitted to the practice of law."

Discussion

The exact nature of the legal theories upon which Perwin bases this civil rights action is somewhat difficult to discern. Perwin claims that Rule 1:20 of the Supreme Court of New Jersey violates the equal protection and due process clauses of the federal constitution both facially and as applied to him because it does not contain formal standards governing attorney discipline and readmission of disbarred attorneys. He argues that the sanctions of disbarment and temporary suspension from the practice of law are "unevenly administered" and therefore the New Jersey Supreme Court's imposition of attorney discipline violates the equal protection clause. Perwin alleges that the New Jersey Supreme Court has imposed discipline essentially on a case by case basis and that "discipline has been disparate and discriminatory and

therefor in violation of the equal practice of the law [sic] provision of the Constitution." Complaint, ¶18.

Further, Perwin argues that the general rule that disbarment is permanent creates an irrebutable presumption that disbarred attorneys are forever unfit to practice law, thereby violating the due process clause of the fourteenth amendment. He claims that the New Jersey disciplinary rules are "overbroad and vague, indefinite, and imprecise, in violation of the First and Fourteenth Amendments. They deprived the Plaintiff of the liberty to choose his profession and the right to pursue his chosen profession, depriving Plaintiff of due process and equal protection of the law." Complaint, ¶24. Perwin also alleges that the rules are "arbitrary and capricious."


In the second count of his complaint, Perwin contends that New Jersey Supreme Court Rule 1:20 is inconsistent with Rule 7G of the United States District Court for the District of New Jersey, which provides that "an attorney who has been disbarred may seek readmission after the expiration of five years." Complaint, Count II, ¶3. Perwin asserts that because of this alleged inconsistency, Rule 1:20 violates the Supremacy Clause of the United States Constitution. In the third count of his complaint, Perwin seeks an order directing Defendant Lite, Clerk of the United States District Court, to provide him with the forms required for admission to the Bar of the United States District Court for the District of New Jersey. This request appears to rest on the theory that although the District Court limits admission to its bar to members of the Bar of ~~the~~ State of New Jersey and because Perwin's non-membership in the New Jersey state bar is unconstitutional, he must be allowed to apply for admission to the

App. 6

bar of the District Court. In his memorandum in opposition to the Defendants' motion for summary judgment, Perwin makes no reference to the Rules of the U.S. District Court for the District of New Jersey or to Defendant Lite.

We first consider the motion of Defendant Allyn Z. Lite, Clerk of the United States District Court for the District of New Jersey, for summary judgment. Lite claims that he is entitled to judgment as a matter of law because Perwin fails to state any claim upon which relief can be granted against Lite. Perwin's complaint cites New Jersey District Court Rule 7G in support of his claim against Defendant Lite. Rule 7G, however, applies to reinstatement of attorneys previously admitted to 'practice before the New Jersey District Court. Perwin does not assert that he was once admitted to the bar of the District Court. Therefore, Rule 7G has no application to him. Furthermore, Rule 4 of the District Court of which we take judicial notice, provides, with limited exceptions, that admission to the New Jersey State Bar is a prerequisite to admission to the District Court Bar. Thus, even if Perwin asserted that he had once been admitted to the District Court bar, his present non-membership in the New Jersey bar precludes his admission to the District Court Bar. We perceive no merit in Perwin's theory that he is entitled to apply for admission to the District Court bar because of his pending claim that his non-membership in the New Jersey Bar is unconstitutional. Perwin has not established any basis whatsoever for a judgment against Defendant Lite.

We next consider the Supreme Court Defendants' motion for summary judgment. The Supreme Court De-



App. 7

fendants assert the following arguments in support of their motion. First, they claim that Perwin is asking this Court to review a judicial proceeding by the Supreme Court of New Jersey and that this Court therefore lacks subject matter jurisdiction of Perwin's complaint. Second, they argue that Perwin already raised his constitutional claims before the Supreme Court of New Jersey and that litigation of those claims in this Court is now barred by the doctrine of collateral estoppel. Third, they claim that Perwin's due process claim lacks merit in that Perwin has not established that he has a property or liberty interest in reinstatement to the bar and therefore has no interest protected by the due process clause, or that, assuming Perwin does have a protected interest, the New Jersey disciplinary rules comport with due process. Finally, the Supreme Court Defendants claim that Perwin's equal protection claim must fail because any distinctions drawn by the New Jersey Supreme Court's rules and practices are rationally related to legitimate state interests.

The United States Supreme Court recently held that federal district courts lack subject matter jurisdiction to review a state supreme court decision denying admission to the bar to a particular applicant. *District of Columbia Court of Appeals vs. Feldman*, 103 S. Ct. 1303 (1983). Such a decision constitutes a judicial proceeding and therefore is reviewable only in the Supreme Court of the United States. *Feldman* does not preclude district court jurisdiction to hear constitutional challenges to disciplinary rules of general applicability which were promulgated in non-judicial proceedings. However, where such a challenge is "inextricably intertwined" with a state supreme court decision involving a particular candidate for admission to the bar, a federal district court has no jurisdiction

to review the state supreme court decision. *Id.* at 1315 n. 16. Perwin does challenge the disciplinary rules of the New Jersey Supreme Court in general. At the same time, however, he argues that the New Jersey Supreme Court acted improperly in denying his application for reinstatement. Perwin's affidavit (attached to his memorandum in opposition) and his brief both assert that Perwin has been rehabilitated and is now fit to practice law. Perwin argues that he as an individual was more harshly disciplined than other individuals similarly situated. *See, e.g.* memo in opposition at p. 6, 28. To the extent that Perwin asks this Court to review the wisdom or constitutionality of the New Jersey Supreme Court's action denying his petition for reinstatement, this Court clearly lacks jurisdiction to do so under *Feldman*. With regard to Perwin's challenge to the disciplinary rules in general, we are of the view that Perwin's general challenge is "inextricably intertwined" with his challenge to the New Jersey Supreme Court's decision regarding his own application, thereby depriving this Court of jurisdiction to hear this case.

Assuming, however, that this Court has jurisdiction to hear Perwin's challenge to the constitutionality of the disciplinary rules in general, we agree with the Supreme Court Defendants that Perwin's due process and equal protection claims are barred by the doctrine of collateral estoppel. Perwin raised his due process and equal protection claims before the New Jersey Supreme Court and that court rejected those claims. After Perwin's constitutional claims were rejected by the New Jersey Supreme Court, Perwin's only recourse was to appeal to the United States Supreme Court under 28 U.S.C. § 1257(2). Because he chose not to appeal to the United States Supreme

App. 9

Court, he is now barred from collaterally attacking the judgment of the New Jersey Supreme Court by relitigating his federal constitutional claims in this Court. *Allen vs. McCurry*, 449 U.S. 90 (1980); *Tang vs. Appellate Division of New York Supreme Court, First Department*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); *Korup vs. Flaherty*, 524 F.Supp. 1160 (E.D. Pa. 1981) (Luongo, J.); *Adams vs. Supreme Court of Pennsylvania*, 502 F.Supp. 1282 (M.D. Pa. 1980) (Nealon, J.).

Perwin attempts to avoid the collateral estoppel doctrine by arguing that he did not have a full and fair opportunity to litigate his constitutional arguments before the Supreme Court of New Jersey and that that court did not decide the constitutional issues presented by Perwin. As noted above, both Perwin and the Division of Ethics and Professional Services addressed due process and equal protection arguments in their briefs regarding Perwin's 1981 application for readmission. The Supreme Court of New Jersey was constitutionally obligated to consider Perwin's federal constitutional claims. *Allen vs. McCurry*, 449 U.S. at 105. Thus, we must reject Perwin's claim that the New Jersey Supreme Court might not have considered Perwin's constitutional claims. That Court necessarily decided those claims adverse to Perwin.

The fact that the New Jersey Supreme Court denied Perwin's second application for reinstatement without opinion does not require a different conclusion. Several courts have noted that the absence of a written opinion does not eliminate the presumption that constitutional claims presented to a court were decided by the court. In *Tang vs. Appellate Division*, 487 F.2d at 141, n. 2, the

Court quoted the United States Supreme Court's statement of this principle:

The question of the constitutional validity of the order was distinctly presented by the appellants' petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it. *Grubb vs. Public Utilities Commission*, 281 U.S. 470, 477-78 (1930).

In a case factually similar to this case, Judge Luongo held that a frustrated bar applicant's constitutional arguments were barred by collateral estoppel after those arguments had been presented to the Pennsylvania Supreme Court in the applicant's petition, despite the fact that his petition was denied without opinion. *Korup vs. Flaherty*, 524 F.Supp. 1165 (E.D. Pa. 1981). *See also*, *Winters vs. Lavine*, 574 F.2d 46, 60-61 (2d Cir. 1978).

To the extent that any of Perwin's constitutional claims were not decided by the Supreme Court of New Jersey, those claims appear to be meritless. Perwin's Supremacy Clause claim is frivolous. The Rules of the United States District Court for the District of New Jersey do not purport to affect the State of New Jersey's power to adopt and enforce attorney disciplinary rules.

Perwin's due process claim fails for two reasons. First, Perwin does not have any liberty or property interest in readmission to the New Jersey bar and therefore cannot claim that he is entitled to due process clause protection. New Jersey state law does not support any "legitimate claim of entitlement" by a disbarred attorney to readmission to the bar. *See Board of Regents vs. Roth*,

488 U.S. 564, 577 (1972). Perwin recognizes this when he argues that there is an "irrebutable presumption" that a disbarred attorney is forever unfit to practice law. *See* Memo in Opposition, at 22-23. In *Re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979). Any liberty interest that Perwin may have had in maintaining his reputation and livelihood as an attorney was lost by him following his disbarment. Moreover, Perwin was granted a hearing in connection with his first petition for reinstatement in 1974. Even assuming that Perwin does have a liberty or property interest in reinstatement to the New Jersey Bar, New Jersey's lack of formal rules governing reinstatement do not violate due process. *See* *Law Student's Civil Rights Research Council vs. Wadmond*, 401 U.S. 154, 159 (1971). Perwin's "irrebutable presumption" argument is undermined by Perwin's recognition of the fact that the New Jersey Supreme Court has, on occasion, reinstated disbarred attorneys. *See* memo in opposition at 27-28. Perwin's equal protection claim fails because the action of the Supreme Court of New Jersey in imposing attorney discipline on a case by case basis is rationally related to a legitimate state interest. *See* *Matter of Randall*, 640 F.2d 898 (8th Cir.), *cert. denied*, 454 U.S. 880 (1981).

For all of the foregoing reasons, the Court will grant summary judgment in favor of all of the Defendants.

/s/ Malcolm Muir,
U.S. District Judge

Dated: 11/17/83